

EXHIBIT 25
Redacted-Public Version

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Page 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NETWORK PROTECTION SCIENCES,)	
LLC,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 3:12-CV-01106-WHA
)	
FORTINET, INC.,)	
)	
)	
Defendants.)	
_____)	

DEPOSITION OF PHIL TRUBEY, taken at
Thorsnes Litigation Services, 2550 Fifth Avenue,
Ninth Floor, San Diego, California, commencing at
9:30 a.m., Thursday, June 13, 2013, before Audrey L.
Ricks, CSR No. 12098, empowered to administer oaths
and affirmations pursuant to 2093(b) of the Code of
Civil Procedure, personally appeared.

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1 APPEARANCES:

2 FOR PLAINTIFF NETWORK SERVICES SCIENCES:

3 GIBBONS, P.C.
 4 BY: CHARLES H. CHEVALIER, ESQ.
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6

7

8 FOR DEFENDANTS FORTINET, INC.:

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1 San Diego, California

2 Thursday, June 13, 2013

3 9:38 a.m. - 12:12 p.m.

4

5 PHIL TRUBEY,

6 having been first administered an oath, was examined

7 and testified as follows:

8

9 EXAMINATION

10 BY MR. CHEVALIER:

11 Q Can you state your name for the record,

12 please.

13 A Phillip Trubey.

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 Q My name is Charles Chevalier, and I

18 represent the plaintiff, Network Protection

19 Sciences, in litigation against Fortinet, Inc.

20 And today I'm just going to be asking you

21 a series of questions and try to be conversational.

22 Have you had your deposition taken before?

23 A No.

24 Q Okay. So, basically, I will ask you

25 questions, and I'm going to ask you to answer them.

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1 I N D E X

2 PHIL TRUBEY PAGE

3 EXAMINATION BY:

4 Mr. Chevalier 4, 77, 84

5 Mr. Cooper 66, 83

6 E X H I B I T S

7 NUMBER DESCRIPTION PAGE

8 136 Fortinet, Inc., Initial 17
 Disclosures dated June 29, 2012

9 137 Fortinet, Inc., Second 22
 Supplemental Initial
 Disclosures

10 138 Thread from Great Circle 39
 mailing list dated 10-17-94

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1 You are obligated to answer fully and completely.

2 And you just took the oath, so you actually have to

3 give the truth, and you're sworn to truth under

4 penalty of perjury.

5 It's not a marathon, so anytime you need a

6 break, just let us know. I will just ask you not to

7 do so while a question is pending.

8 I'm going to ask for verbal communication,

9 so head nods or "ums" aren't going to work. So if

10 you can just answer verbally, I'd appreciate that.

11 A Yes.

12 Q Thank you.

13 Let's just try to not talk over one each

14 other. I will try to finish my question, let you

15 answer, and I will try not to break into your answer

16 with another question.

17 So do you understand all that?

18 A Yes.

19 Q Is there any reason why today you might

20 not be able to testify truthfully?

21 A No.

22 Q Are you under any kind of current

23 medications or anything?

24 A No.

25 Q Do you have any questions about the

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1 deposition at all?

2 A No.

3 Q Okay. You just -- I just want to get some

4 general background.

5 Can you provide me with your educational

6 background?

7 A I have a bachelor's in mathematics from

8 the University of Waterloo. Graduated in 1987.

9 Mathematics/computer science. That's my education

10 background.

11 Q Okay. Have you had any other degrees?

12 A No.

13 Q Any other professional training?

14 A No.

15 Q So after getting your degree from

16 Waterloo, what did you do after that?

17 A Let's see. I worked as -- I worked at

18 Carlton University for a couple years as kind of a

19 network administrator, system administrator. Then I

20 worked for SHL Systemhouse in Canada for about four

21 years as a software network consultant.

22 I then came down to the States and worked

23 for Systemhouse for an additional two years out of

24 their San Francisco office; again, as a

25 networking -- computer networking consultant.

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1 AppleTalk.

2 Q Were you using any kind of routers?

3 A Sure. Definitely used routers. You know,

4 back then, talking about late '80s, even in the

5 academic setting, networking, doing campuswide

6 ethernet was still fairly new. So I was involved

7 in putting together the first campuswide ethernet

8 for Carlton University.

9 Q It was an isolated ethernet; there was no

10 outside connection to any kind of a T1 or --

11 A Oh, boy. Let me try to remember. Carlton

12 at the time, I believe we were not on the Internet

13 at that time.

14 Q Then you went to, is it SHL Systemhouse?

15 A Yeah.

16 Q And you worked as a software consultant?

17 A Software networking. Yeah, I did a

18 variety of projects there.

19 Q Did that involve any kind of external

20 connection?

21 A Yes. If I remember, I wasn't in the

22 IT department of Systemhouse. It was client

23 projects that I was working on. I worked on a

24 proposal to create a Canadian version of the

25 Internet. We didn't actually implement it. We

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1 And then in '94, I started my company,

2 NetPartners, and then I ran that for about five

3 years.

4 And then shortly after -- and then I left

5 NetPartners -- well, I left. That company was

6 renamed Websense part of the way through.

7 Anyway, and then I -- now we're getting

8 around 2000. I joined another start-up, anyway, and

9 then I basically retired in 2001.

10 Q So at Carlton University, you worked on

11 networks?

12 A Yes.

13 Q Did any of that involve firewall

14 technology?

15 A At Carlton, no.

16 Q Do you know what it specifically involved?

17 A It was an academic environment. We were

18 looking after the student computers, so it would be

19 labs, like, 30 computers. We'd be networking them

20 together, different kinds of computers: Macintosh,

21 PC, Unix computers; getting courseware ready for the

22 professors, that kind of stuff.

23 Q Do you recall how you were networking them

24 together?

25 A Primarily, we would be using ethernet and

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1 didn't win that contract.

2 Q Do you know who won that contract?

3 A I do not.

4 Q Do you know if it was Glenn Mackintosh?

5 A No. I have no idea.

6 Q Do you know who Glenn Mackintosh is?

7 A Yeah.

8 Q Do you recall specifically what you did as

9 a consultant for any customers back then?

10 A I'm trying to remember some specific

11 projects. I mean, one project, I worked for a -- a

12 manufacturer of network switches and routers, and I

13 was working on SNMP management consoles for them.

14 So it was a combination of software networking.

15 As I said, I did that proposal for --

16 actually a proposal for the Canadian government to

17 create a backbone network across Canada for the

18 Internet.

19 Another one was a small Canadian

20 government department, networking -- hooking their

21 computers up in a LAN network.

22 Q Did any involve firewall technology?

23 A You know, back then, no. I don't think I

24 actually did any -- working for Systemhouse, I don't

25 think I did any actual firewall technology.

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1 Q Was there any connection to the Internet,
2 as it's called today?

3 A Yeah. I don't believe it was.

4 Q Okay. You started NetPartners in 1994?

5 A Uh-huh.

6 Q Do you know when in 1994?

7 A January 1st.

8 Q And how do you recall that so vividly?

9 A It just was. I mean, it's a very unique
10 date, right? I mean, I basically terminated my --
11 you know, I quit my job at Systemhouse, and
12 that's -- that's when the date was.

13 Q Okay. Now, do you have any personal
14 experience with firewalls or firewall technology?

15 A Now?

16 Q At any time, actually developing the
17 technology?

18 A Oh, developing the technology.

19 Q Development for -- or system architecture.

20 A Somewhat. I mean, in '94, my idea,
21 initially what I -- well, so what I did in '94, the
22 beginning of '94, I did two things. One, I did some
23 follow-on contracts as a consultant working,
24 actually, with Systemhouse -- or through them,
25 rather -- as an independent consultant. But at the

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1 And then the firewall functionality would
2 have been fairly rudimentary. It would have been
3 packet blocking and the like. So I wasn't planning
4 on doing anything that sophisticated.

5 Now, what the Border folks did is they had
6 a more sophisticated firewall portion of it. They
7 had application-level firewall. So -- yeah.

8 Q And the first time you heard of that was
9 in September of '94?

10 A The first time I saw a product like that,
11 yeah.

12 Q When you say "saw a product," what do you
13 mean?

14 A Well, I was at the Interop conference, and
15 I saw that product.

16 Q What were they displaying at the -- was it
17 the Interop conference in New York?

18 A Interop in Atlanta.

19 Q It was Atlanta. Okay.

20 A They were developing -- they were showing
21 their JANUS firewall product. And it was a box that
22 sat between the Internet and a company's LAN
23 network, and it provided a mail gateway. So mail
24 would be stored on the box and then forwarded on
25 internally. And they provided other -- other --

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1 same time, I was developing my own product, and my
2 own product would have been a connection gateway to
3 allow companies to attach to the Internet. And so I
4 was programming that.

5 In conjunction with that, that's why I
6 went to -- I went to the Interop conference in
7 September of '94. And while I was at the Interop
8 conference, I saw Border Network Technologies and
9 their JANUS firewall. And they had developed
10 essentially what I was developing with more of an
11 emphasis on firewalls. I was developing more of an
12 application gateway system. Theirs was more focused
13 on firewalls. But whatever, I saw it as the -- a
14 finished product of what I was trying to develop
15 myself.

16 So I made the decision to, instead of
17 continuing just myself, I made the decision to
18 resell -- resell their product in the United States.

19 Q When you say -- what kind of distinction
20 do you draw between an application layer gateway and
21 a firewall?

22 A Well, what I was developing was -- I was
23 going -- I was going to put a mail gateway and a
24 news gateway and various other services on a box
25 that would be forward-facing out to the Internet.

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1 other application gateways. I think it was -- well,
2 now my brain gets fuzzy as to what the other
3 application gateways are.

4 Q Do you have any records of what they were
5 showing at the Interop?

6 A Do I have any records? No.

7 Q And now, what you were developing
8 yourself, is that what Websense --

9 A No.

10 Q So the Webster -- Websense products were
11 different?

12 A Yes.

13 Q So when you formed NetPartners in 1994,
14 what was NetPartners' basic mission? What was the
15 business model for it?

16 A Well, the initial idea was develop a
17 product that we could sell. At Interop, I changed
18 that to be reselling somebody else's firewall. And
19 we did that. You know, I did that success -- I did
20 that successfully. I hired, I think, three people
21 in '95.

22 And then in '96, I hired a software
23 developer to develop our own product, Websense. And
24 the company kept growing just by installing mostly
25 the JANUS firewall, which at some point changed its

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1 name to BorderWare. Then, eventually, we moved on
 2 to other firewalls as well.
 3 Q When you say "we," do you mean as a
 4 reseller?
 5 A Yes.
 6 Q What other firewalls were you -- as a
 7 reseller, just tell me exactly what a reseller does.
 8 A So a reseller/integrator. So we would get
 9 the software, the firewall software, from the
 10 manufacturer. We would put it on our own hardware,
 11 hardware that we would buy from somebody. We would
 12 then configure it for the specific network, customer
 13 network, and -- and install it in the customer
 14 network and then provide support in the customer
 15 network.
 16 Q Did you ever work at WatchGuard?
 17 A No.
 18 Q Did you ever work for Border Network
 19 Technologies?
 20 A No.
 21 Q Did you do anything to prepare for today's
 22 deposition?
 23 A I looked up when that Interop conference
 24 was because I didn't remember when it was. I knew
 25 it was summer/fall of '94 because it's a very

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1 BY MR. CHEVALIER:
 2 Q And when did you speak with them?
 3 A I guess Drew contacted me about, I'd say
 4 about a month ago, something like that.
 5 Q Is that the first time you had contact
 6 with them?
 7 A Yes.
 8 Q Did you speak to anyone else?
 9 A Concerning this? No.
 10 Q Any of your former employees?
 11 A No.
 12 Q Any BorderWare employees?
 13 A No.
 14 Q Now, besides looking up the date of the
 15 Interop and reviewing your one e-mail, did you do
 16 anything else to prepare for today?
 17 A Other than looking up the financial
 18 information, no. I had a meeting yesterday with
 19 Will, who told me what a deposition was like and
 20 what was going to happen. That's it.
 21 Q And how long did you meet with him
 22 yesterday?
 23 A About half an hour.
 24 Q Do you know when you were first contacted
 25 in this litigation?

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1 particular thing, right? It kind of changed the
 2 direction of what I was going to do, so I looked up
 3 when that occurred. It occurred in September. But
 4 other than that, no.
 5 I mean, I read the -- I read the e-mail
 6 that I wrote to refresh my memory of it, but
 7 that's -- that's about it.
 8 Q When you say "e-mail," are you referring
 9 to the Great Circle e-mail?
 10 A Yes.
 11 Q Did you review any other documents?
 12 A I -- I did check my financial documents
 13 that I had, actually had -- I still have financial
 14 documents from '94 and '95 -- to see if there were
 15 any documents there of interest. So I did check
 16 that.
 17 Q Now, were those financial documents that
 18 kind of summarized the sales of the JANUS software?
 19 A Yes.
 20 Q Did you speak with anyone?
 21 A I spoke with Will and -- who is the other
 22 lawyer's name?
 23 MR. COOPER: Drew.
 24 THE WITNESS: Drew. Those are the two
 25 people I spoke to.

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1 A Sorry. Do I know when?
 2 Q Do you know when -- did anybody else --
 3 prior to when Drew contacted you a few months ago,
 4 did anyone else contact you prior to that?
 5 A No.
 6 Q Anybody from WatchGuard or WatchGuard's
 7 attorneys?
 8 A No.
 9 (Discussion held off the record)
 10 MR. CHEVALIER: I will mark this 136.
 11 (Exhibit 136 marked)
 12 BY MR. CHEVALIER:
 13 Q Exhibit 136 is Defendant Fortinet, Inc.'s
 14 initial disclosures. The service date is
 15 June 29th, 2012.
 16 Mr. Trubey, do you have that document in
 17 front of you?
 18 A Yes.
 19 Q Can you turn to page 5, please.
 20 A Uh-huh.
 21 Q Now, that big last box, the three boxes,
 22 it says: "Individuals previously associated with
 23 Border Network Technologies and JANUS BorderWare
 24 products."
 25 And do you see your name listed under

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1 there?

2 A Yeah.

3 Q And then it says: "Contact through

4 counsel for WatchGuard to the extent contact

5 information is known."

6 You've never spoken to WatchGuard at all?

7 A No. I mean, as far as this goes, right?

8 I mean --

9 Q This case.

10 A This case, yeah. I mean, I might have

11 talked to WatchGuard, like, 20 years ago.

12 Q The company?

13 A The company.

14 Q You never talked to the attorneys --

15 A No.

16 Q -- who are representing WatchGuard --

17 A No.

18 Q -- in this litigation?

19 A No.

20 Q And you weren't then or currently now

21 associated with WatchGuard?

22 A No.

23 Q Were you ever associated with

24 Border Network Technologies?

25 A Not other than being a reseller.

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1 Q The availability to the public to be able

2 to purchase it or its disclosure.

3 A You mean back in '94?

4 Q Right, at any time.

5 A Any time. Sure.

6 Q Were you ever contacted by Juniper or

7 Juniper's counsel, Irell & Manella LLP?

8 A No.

9 Q Were you ever contacted by SonicWALL or

10 SonicWALL's counsel, Carr & Ferrell LLP?

11 A No.

12 Q Were you ever contacted by DeepNines or

13 DeepNines' counsel, Akin Gump Hauer Strauss & Feld?

14 A No.

15 Q Were you ever contacted by Wilson Sonsini?

16 A No.

17 Q So the first time that Fortinet or

18 Fortinet's counsel contacted you is when Drew

19 contacted you a couple months ago?

20 A Yeah.

21 Q When was that?

22 A I'd have to look it up in my e-mails, but

23 it was about, you know, one or two months ago.

24 Q And they contacted you?

25 A Yes.

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1 Q Were you ever associated with

2 Secure Computing?

3 A No.

4 Q Do you have any information relating to

5 the conception of the JANUS BorderWare software?

6 A No.

7 Q Do you have any information relating to

8 the reduction to practice of the JANUS BorderWare

9 software?

10 A I don't even know what that means.

11 Q Do you have any information relating to

12 the functionality of the JANUS BorderWare software?

13 A Just in general, vague terms from what I

14 can remember, but nothing very specific.

15 Q For convenience, is it more preference if

16 we refer to it as JANUS, or BorderWare?

17 A Back then, it was called JANUS, and it

18 changed its name to BorderWare. I don't care.

19 Q But either one, you will obviously know

20 what I'm talking about?

21 A Yeah.

22 Q Okay. And do you have information

23 relating to the availability of the JANUS software

24 product?

25 A What do you mean by "availability"?

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1 Q And they are representing you today;

2 Quinn Emanuel is representing you today?

3 A I don't believe so. I mean, I'm here just

4 to give a deposition.

5 Q So you're not being represented today?

6 A No.

7 Q Are you being compensated for your time

8 today?

9 A Not today.

10 Q If this case goes to trial and you are

11 asked to testify at trial, will you?

12 A Yeah.

13 Q I think I asked you: Do you have

14 information relating to the functionality of the

15 JANUS BorderWare product?

16 A I know in nontechnical terms how it -- it

17 worked or what it purported to do, but that's about

18 it.

19 Q Okay. Who -- do you know who would be the

20 best person to testify to its functionality?

21 A No.

22 Q Would Glenn Mackintosh be the best person?

23 A I wouldn't know. I know he was a

24 principal engineer at JANUS back then; but, no,

25 you'd have to ask him.

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1 Q At BorderWare; right?

2 A Sure. BorderWare. Right.

3 Q Do you know who developed the JANUS

4 software?

5 A I do not know.

6 Q Is there any other information you're

7 aware of that relates to the issues in this case

8 that you would testify on?

9 A I don't know. I'll answer questions.

10 MR. CHEVALIER: Marking Exhibit 137.

11 (Exhibit 137 marked)

12 BY MR. CHEVALIER:

13 Q Exhibit 137 is Fortinet, Inc.'s Second

14 Supplemental Initial Disclosures.

15 Do you have that document in front of you,

16 Mr. Trubey?

17 A Yes.

18 Q Can you turn to page 7, please.

19 Do you see your name listed there?

20 A Yes.

21 Q And underneath it, it says: "C/O Quinn

22 Emanuel"?

23 A Uh-huh, yes.

24 Q But you're not being represented by them

25 today?

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1 A Well, yes. It was a mailing list that

2 technical people read and posted to, and I was one

3 of those people.

4 Q Was the mailing list and message board one

5 in the same, or were they two separate things?

6 A I believe it was just a mailing list.

7 Q And that only applies to the Great Circle

8 firewall, not the JANUS firewall server; there isn't

9 a JANUS firewall server mailing list and message

10 board?

11 A As far as I know, there was not.

12 Q Besides the JANUS firewall server and

13 Great Circle firewall mailing list, is there any

14 other relevant prior art that you're aware of?

15 A Prior art of what?

16 Q Patent-in-suit.

17 A I do not know anything about the patent.

18 Q Have you ever heard of Hung Vu?

19 A Yes.

20 Q What do you know of him?

21 A He was a principal at Milkyway Networks.

22 I might have even met him. Turns out that

23 Milkyway's offices were in Ottawa, in Canada, and

24 that happens to be my hometown.

25 So one time, you know, it would have been

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1 MR. COOPER: I'll state for the record

2 that we're not representing Mr. Trubey.

3 MR. CHEVALIER: Thank you.

4 BY MR. CHEVALIER:

5 Q Then "Possible subject," it says: "Prior

6 art to the patent-in-suit including a JANUS firewall

7 server and Great Circle firewall mailing list and

8 message board."

9 Do you see that?

10 A Yes.

11 Q Do you know what prior art to the

12 patent-in-suit you're going to be testifying on?

13 A No.

14 Q Will you be testifying regarding the JANUS

15 firewall server?

16 A I'll answer any questions you ask of me.

17 You know, I'm just here to answer questions.

18 Q But you haven't been asked to -- you

19 haven't been asked by Fortinet or Fortinet's counsel

20 to testify regarding the JANUS firewall server?

21 A They asked me if I knew things about it,

22 and so I said yes. And so I'm happy to testify.

23 Q Do you have any information relating to

24 the Great Circle firewall mailing list and message

25 board?

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1 the '95, '96 time frame, for Christmas, I remember

2 making a trip back home back to my hometown, and I

3 met with Milkyway briefly for a possibility of

4 reselling their Internet firewall.

5 Q What Internet firewall product did they

6 have?

7 A The Milkyway Black Hole, I believe.

8 Q Did you ever become a reseller for that?

9 A You know, we might have. I do not recall

10 definitively whether we did or not. If we did, we

11 certainly didn't sell a lot of them, but I don't

12 recall definitively whether we did or not.

13 Q Okay. Did you ever review U.S. Patent

14 Number 5,623,601?

15 A No.

16 Q Never looked at it at all?

17 A No.

18 Q Do you have any patent applications

19 yourself or patents?

20 A There was one software process patent that

21 a -- that we applied for. I don't think it was

22 granted, though.

23 Q When you say "we" --

24 A It was a company I worked with. Now that

25 I think about it, my name probably wouldn't have

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1 been on it anyway.

2 Anyway, it was -- the company was called

3 Cachepile [phonetic], and it's out of business now,

4 and I don't think the patent was ever granted.

5 Q So you did not assist in the development

6 of the JANUS firewall product?

7 A No.

8 Q You didn't do any of the coding?

9 A No.

10 Q Do you know who did the coding?

11 A No.

12 Q Do you know when the product was

13 developed?

14 A I don't know when it was developed.

15 Q Do you know when it was ready for market?

16 A I used it in -- I used it in October of

17 '94, and I had it operational in October of '94, and

18 I started selling it around that time frame.

19 Q When you looked at your financials, do you

20 recall when your first sale was?

21 A So my first sale was January 1st, '95.

22 Sorry, January 4th, '95, sorry.

23 Q And do you have those records?

24 A I do.

25 Q And if you were asked, would you produce

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1 Black Hole product?

2 A I do not recall whether we sold it or not.

3 Q Did you attend any other trade shows?

4 A Yes.

5 Q Do you know which -- was that where the

6 JANUS product was being displayed?

7 A Yes.

8 Q Do you recall which ones?

9 A No.

10 Q But there wasn't anything earlier than the

11 Interop in Atlanta in September of '94?

12 A As far as -- well, not that I attended.

13 Q And do you have any -- any proof that it

14 was demonstrated at the Interop trade show in

15 September of '94?

16 A I don't have any physical proof. I just

17 have my recollection.

18 Q And how did you know that -- well, from

19 what you recall, how do you know that it was

20 functioning? Did you see the source code, or --

21 A I saw a demonstration, of course, of the

22 user interface. I don't recall whether or not they

23 had demonstration computers on either side of the

24 firewall to actually show the functionality. I

25 don't recall that. They might have; might not have.

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1 those records to us?

2 A Sure.

3 Q And do you have any records regarding when

4 you, I guess, deployed or had the operational

5 product running?

6 A Yeah. I have that e-mail that I wrote in

7 October of '94 to the Great Circle mailing list

8 where I -- in that e-mail, I stated that I had it

9 running in my office and that I was a reseller for

10 JANUS firewall.

11 Q Were you selling any other firewall

12 products at any time?

13 A Not at that time. Later, the company sold

14 other products.

15 Q Do you know when?

16 A I'm pretty sure it would not have been --

17 well, not '94, not '95. Probably '96, we started

18 selling the -- I believe it was called FireWall-1.

19 But I think we started selling another one in '96.

20 Q And why did you decide to start selling

21 another firewall product?

22 A It had -- it had features that the JANUS

23 didn't have, and it was the -- it had compelling

24 features that JANUS didn't have.

25 Q I'm sorry, did you say you ever sold the

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1 Q You only recall seeing the user interface?

2 A Uh-huh.

3 Q But you don't recall that it actually had

4 an operational system up and running?

5 A Right. I don't recall whether they

6 actually had other computers to test the

7 functionality of it at the show.

8 Q And at the show, the product itself wasn't

9 being made available for sale at that time?

10 A Oh, yes, it was. It was. And I -- I

11 mean, that's -- that's where I -- I mean, they were

12 looking to find distributors, and that's why I

13 signed up as a distributor then.

14 Q Right. But when you signed up as a

15 distributor, you didn't actually make any purchase

16 of the product?

17 A I didn't buy it right then and there, no.

18 Q Did you ever -- prior to that, had you

19 ever met any of the people from BorderWare?

20 A No.

21 Q As a reseller, did you have an agreement

22 with BorderWare?

23 A Yes.

24 Q And do you know when that agreement was

25 executed?

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1 A No.

2 Q Do you have a copy of that agreement?

3 A No.

4 Q Do you recall if that agreement contained

5 confidentiality provisions?

6 A I don't recall the agreement. I don't

7 recall what was in the agreement specifically.

8 Q So do you know if you were an exclusive

9 reseller of the product in the United States?

10 A We were not an exclusive.

11 Q And how do recall that? Do you recall

12 from the agreement?

13 A I just remember in '95, there were other

14 resellers that were signed up in the United States.

15 Q In '95?

16 A In '95. Yeah.

17 Q Do you know when the JANUS or BorderWare

18 product became available?

19 A It was ready to install in -- in October

20 of '94 because I had installed an operational copy

21 of it in October of '94.

22 Q Do you know if there were any other

23 operational copies installed at that time?

24 A I do not.

25 Q And how did you market the product once

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1 times when you did?

2 A There might have been. Might have been a

3 client that specifically would ask for that, so I

4 would go to the extra trouble of showing that. But

5 I don't -- I can't recall exactly what happened in

6 all the different demos that I did.

7 Q Do you know how many demos you did?

8 A Typically, it would be one demo per

9 customer. Back then, they wanted to actually see it

10 running.

11 Q And these outside demonstrations, did

12 BorderWare kind of instruct you on how to do the

13 demonstrations?

14 A No, not really. No. It was just my

15 understanding of the product and learning about the

16 product. I mean, I -- I needed to really understand

17 it well, so I put it through its paces and tried --

18 you know, in my own office, I set up computers on

19 both sides of the firewall and put a packet monitor

20 to actually see what was happening. So I could

21 actually see from a -- from a network perspective

22 how the firewall was dealing with the packets.

23 Q You set up -- you connected two

24 computers --

25 A Uh-huh.

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1 you became a reseller?

2 A Market it? A variety of ways. One way

3 was that Border would -- you know, Border Network

4 Technologies would send me leads. So I would phone

5 the leads and set up the -- typically set up

6 demonstrations, on-site demonstrations.

7 Other ways, through things like the

8 Great Circle mailing list. I also started doing

9 some cold-calling to likely companies that might be

10 attaching to the Internet. I attended trade shows;

11 got leads from trade shows.

12 Q When you did outside demonstrations, what

13 did that involve?

14 A It involved bringing a computer with the

15 BorderWare or JANUS software loaded onto it and

16 showing them the user interface and how it worked.

17 Q Did that just involve showing the user

18 interface?

19 A Yeah, because typically, you know, showing

20 the actual firewall functionality was -- would have

21 been more involved.

22 Q So your outside demonstrations didn't

23 involve showing the actual firewall functionality?

24 A Actually demonstrating it, typically not.

25 Q When you say "typically not," there were

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1 Q -- with the product in between it?

2 A Uh-huh.

3 Q And you have no knowledge of whether or

4 not the JANUS wall product was available prior to

5 September of '94?

6 A I don't.

7 Q And you started running it in October

8 of '94?

9 A I know I ran it in October of '94.

10 Could've been September, for all I know; but, you

11 know, those precise dates are hard to pin down, so

12 I'm going just based on the e-mail that I wrote.

13 Q But besides that e-mail, you have no other

14 proof?

15 A Correct.

16 Q So you are just basing it on the e-mail?

17 A Yeah.

18 Q There's no specific date in the e-mail?

19 A Well, there was a specific date in the

20 e-mail. The date of the e-mail itself was the

21 17th of October. But other than that, there was no

22 date that said that I had it running by a specific

23 time. It just said that I have it running. So at

24 that date, I had it running.

25 Q So by October 17th, you had it running at

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1 some point?

2 A Yeah.

3 Q Do you know when you made the first sale

4 of the product?

5 A Well, the first booked sale that I had

6 delivered was a January 1st, 1995 sale --

7 January 4th. I keep saying January 1st. I meant

8 January 4th, 1995.

9 Q Then NetPartners became Websense?

10 A Yes.

11 Q Or did one company dissolve and another

12 company form?

13 A Technically, net -- oh, gosh, how did that

14 actually happen? I believe the -- I believe it was

15 just a name change at that point from NetPartners to

16 Websense.

17 Q So does Websense still act as a reseller?

18 A I don't know. They -- they are a much

19 bigger company now, and they may or may not still

20 have that, you know, the firewall reselling as a

21 part of their business. I don't know.

22 MR. CHEVALIER: We've been going almost an

23 hour. You want to take a break now?

24 MR. COOPER: Sure.

25 MR. CHEVALIER: Go off the record.

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1 of '94?

2 A '94, I have -- I have a P&L, profit and

3 loss statement. So it didn't show any sales of --

4 of any firewalls in '94, so that's why I know the

5 first one was January 4th, '95.

6 Q Is that because there was none in '94?

7 A Presumably there was no actual sales

8 in '94.

9 Q But you have a record that shows a sale on

10 January 4th of '95?

11 A Yes.

12 Q Have you provided that to Fortinet?

13 A Yes. To Quinn Emanuel.

14 MR. CHEVALIER: Has that been produced?

15 MR. COOPER: It has not been produced.

16 MR. CHEVALIER: Is it going to be

17 produced?

18 MR. COOPER: Are you requesting that it be

19 produced?

20 MR. CHEVALIER: If you're relying on it,

21 you should be producing it.

22 MR. COOPER: Understood.

23 MR. CHEVALIER: I think we asked for sales

24 of the -- well, I don't know if we asked for that;

25 but, yes, if you have it, we would like it produced.

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1 (Recess from 10:21 a.m. to 10:32 a.m.)

2 BY MR. CHEVALIER:

3 Q Going back on the record.

4 I just have a few questions that we talked

5 about previously.

6 You said that Drew from Quinn Emanuel

7 contacted you two months ago.

8 Is there anything that you guys discussed?

9 A He said that he was representing Fortinet

10 in a patent dispute and that I might have

11 information based on the e-mail that he got off of a

12 Great Circle mailing list.

13 Q Did he specifically say what that

14 information was?

15 A He said if there's any information

16 about -- about my use of the JANUS firewall back in

17 '94; if there was any other information I had about

18 that.

19 Q And was the e-mail the only information

20 you had?

21 A Well, you have the e-mail. And then as I

22 said, I looked up the accounting summaries that I

23 still had from '94 '95. And, yeah, that's about

24 what -- all I have.

25 Q What accounting summaries do you have

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1 MR. COOPER: Okay. I will take that under

2 consideration.

3 MR. CHEVALIER: Thank you.

4 BY MR. CHEVALIER:

5 Q Are there any other documents that you

6 provided to Quinn Emanuel?

7 A No.

8 Q So only the sales records?

9 A P&L, '94 P&L and the sales record for '95.

10 Q And do you know who you made the first

11 sale to?

12 A Zenith Insurance.

13 Q Where are they located?

14 A I believe they were located in

15 Orange County.

16 Q If we can get the P&L produced as well,

17 please?

18 MR. COOPER: Your request is noted.

19 MR. CHEVALIER: Thank you.

20 BY MR. CHEVALIER:

21 Q Besides the P&L and your sales, did you

22 provide any other documents to Quinn?

23 A No.

24 Q Then you talked to Will, counsel sitting

25 next to you, yesterday?

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1 A Yes.

2 Q What else -- what did you talk about then?

3 A Just talked about -- in general terms

4 about what a deposition is and that I should answer

5 truthfully, and that's about it. Just general

6 terms.

7 Q Did you talk about any specifics of the

8 case?

9 A No.

10 Q When you talked to Drew two months ago,

11 did you talk about any specifics of the case?

12 A No. I mean, he was just asking if I had

13 any documentation about that period of time, and I

14 said I would look.

15 He asked if I had any e-mails. I looked.

16 I didn't find any e-mails.

17 Q No e-mails?

18 A No.

19 Q Are there any other documents he asked you

20 to look for?

21 A No.

22 Q And there's nothing else he provided to

23 you?

24 A No.

25 MR. CHEVALIER: Marking Exhibit 138.

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1 you started running the JANUS firewall?

2 A No.

3 Q If you would turn the page, please.

4 A Uh-huh.

5 Q Well, it's the same page. I'm sorry. And

6 it says there's some "bugs."

7 Do you know what "bugs" you're referring

8 to?

9 A Well, I wrote "cosmetic bugs," so I would

10 assume these are user interface bugs, but that's

11 what my assumption is.

12 Q But you don't recall specifically?

13 A Yeah. You know, "cosmetic bugs" to me

14 means user interface bugs. If they were

15 functionality bugs, that would be different.

16 Q Okay. It says: "We certainly put it

17 through some comprehensive tests ourselves."

18 A Uh-huh.

19 Q Do you know what testing you put it

20 through?

21 A I would have done firewall testing on it.

22 I would have made sure that, from a firewall

23 perspective, it did what it was supposed to do.

24 Q You're saying you "would have," but what

25 did you do?

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1 (Exhibit 138 marked)

2 BY MR. CHEVALIER:

3 Q Exhibit 138 is a thread, I believe, from

4 the Great Circle mailing list.

5 Do you have 138 in front of you?

6 A Yes.

7 Q Can you turn to the page that's numbered

8 Bates number FORT-MPS058692.

9 A Okay.

10 Q If you look at the bottom, it starts with:

11 "While we were running at our site," and continuing

12 onto the next page.

13 A Yes.

14 Q Is that the e-mail that you're referring

15 to that you found?

16 A Yes.

17 Q And then it says: "While we are running

18 it," you being the NetPartners?

19 A I mean that NetPartners is running the

20 JANUS firewall.

21 Q And was it just you at the time?

22 A Yes, it was.

23 Q And this is dated October 17th, 1994.

24 A Yeah.

25 Q And you have no records of exactly when

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1 A I do not recall exactly what I did back

2 then. I just go based on what this e-mail says.

3 Q So you have no recollection of actually

4 testing it?

5 A I recollect testing it. I don't recall

6 the tests that I put it through.

7 Q Do you recall what you did to test it?

8 A Specifically, no.

9 Q And do you know -- do you know why you

10 used "we" instead of "I"?

11 A Trying to make myself -- trying to make

12 the company appear bigger than it was.

13 Q That's what I thought, just . . .

14 Now, the Interop trade show -- what made

15 you want to be a reseller for the JANUS product?

16 A After seeing the JANUS product, I had the

17 feeling that my own development project would have

18 been too little too late and that this space was

19 rapidly moving.

20 So I decided to -- instead of developing

21 my own product, I decided to just get my -- you

22 know, my, if you will, my foot in the door and get

23 into the game just by reselling and then seeing

24 where that would go.

25 Q Would you say you were successful at

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1 selling the JANUS product?

2 A Oh, yeah.

3 Q What would you attribute the success to?

4 A Well, two things: One, my background, you

5 know, good technical background; and, two, the

6 product was solid. It worked.

7 Q And what was -- when you say "solid," what

8 do you mean by that?

9 A Didn't have any major bugs.

10 Q But I mean what -- is any product that

11 would have been bug-free would have been solid

12 product? What was it specifically about JANUS that

13 you think made it --

14 A There weren't a lot of competitors back

15 then, right? It did what it advertised it was

16 supposed to do, and there really weren't many

17 competitors at all back then.

18 Q Do you know any of the competitors back

19 then?

20 A I don't recall. For instance, Milkyway, I

21 don't recall when their product came out. If I

22 recall any other competitors? The main thing that

23 people were doing back then for firewalls was they

24 were using a Unix machine running essentially

25 router-based rules. It's a lot less sophisticated.

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1 possible you could use -- there's various Internet

2 archives, the Wayback Machine and the like. It's

3 possible I could dig out an old NetPartners Web site

4 that was archived at one of those archives, but I

5 haven't done that. That's where the marketing

6 materials would have been. It would have been on

7 the Web site.

8 Q What exactly were you selling? Were you

9 selling the software, or were you selling

10 preinstalled on a machine?

11 A We were selling preinstalled on a machine.

12 Q And why were you doing it that way?

13 A Two reasons: One is that the software --

14 well, back then, the PC hardware wasn't as

15 standardized as it is today, so you couldn't just

16 run it on any random PC. It had to be the right

17 kind of PCs, right kind of drivers, right kind of

18 whatever, right kind of hardware.

19 So it was a way to make an installation

20 much more easier and smooth. You know, if we had

21 installed it on random customer PCs, half the time,

22 it wouldn't have installed or whatever. We would

23 have had installation issues.

24 So we -- and then, of course, we made

25 margin on the hardware too.

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1 So there weren't a lot of actual products that --

2 that did what JANUS did.

3 As to what other ones there were back

4 then, I don't recall what other ones there were.

5 But there weren't many.

6 Q Was there anything specific to the JANUS

7 product that customers -- appealed to customers?

8 A Is there anything specific? I don't

9 recall any specific feature other than, you know,

10 the majority of customers liked.

11 Q Would it be the fact that it ran

12 transparently?

13 A That certainly was a big selling feature,

14 the fact that it -- it appeared like there was --

15 wasn't something in the way.

16 Q Did you use that in your marketing

17 materials?

18 A I don't recall.

19 Q Do you recall anything that you used in

20 your marketing materials?

21 A No.

22 Q Do you have any of your marketing

23 materials?

24 A No. But thinking about it, it's possible.

25 You know, I hadn't thought about this, but it's

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1 Q And your P&L would reflect the difference

2 between profitability of the software and the

3 hardware?

4 A Sure.

5 Q You separate those out by separate product

6 lines?

7 A Right. I'm trying to remember whether --

8 whether I have a P&L for '95. I would have to check

9 because that's when we started selling the actual

10 product.

11 I know I have a sales journal for '95, and

12 that's what -- I gave one page to Quinn Emanuel.

13 But I -- I think -- yeah. Now they think about it,

14 I think I do have a P&L for '95. And I'm pretty

15 sure it's broken out between the hardware and

16 software, but don't quote me on that until I

17 actually look at it.

18 Q You said you started selling something in

19 '95. What were you referring to?

20 A I said the JANUS firewall. I actually

21 booked the sale in '95.

22 Q And the ledger that you had, would that be

23 within your definition of what your financial

24 documents that you provided to Quinn Emanuel were,

25 or was that separate item?

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1 A Right. I provided Quinn Emanuel -- for
 2 '95, I provided them a single page of my sales
 3 journal.
 4 Q And the software that you were putting on
 5 the machines and selling to your customers, that
 6 software was worked on the application level proxy?
 7 A Yes.
 8 Q Did it have static routing?
 9 A I don't recall.
 10 Q Do you know if the source routing was
 11 disabled?
 12 A I do not recall.
 13 Q Did it have internal mapping to the single
 14 external address?
 15 A Network address translation, I believe it
 16 did. But I got to say, my recollection of specific
 17 technical functionality of JANUS is pretty hazy at
 18 this point in time. I shouldn't be relying to tell
 19 you how exactly JANUS worked. I knew back then, but
 20 I don't -- my recollection is pretty hazy by now.
 21 Q Thank you for that. I'm just asking what
 22 your knowledge is. So if you don't know, an "I
 23 don't know" is a fine answer.
 24 Do you know if it incorporated a secure
 25 anonymous FTP server?

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1 firewall outgoing, Sunday, October 30th, 1994"?
 2 A Uh-huh.
 3 Q Turn to the next page. If you turn to
 4 page 58702 --
 5 A Uh-huh.
 6 Q -- do you know who Rod Adkins is?
 7 A Yeah.
 8 Q Who is he?
 9 A Well, he -- he obviously worked for
 10 Border. But then he -- at some point in time, he
 11 started working for our company, NetPartners,
 12 Websense.
 13 Q For Websense, or for the predecessor?
 14 A I don't recall exactly when he joined us.
 15 Q What does he do for Websense?
 16 A What he did, he was a business development
 17 manager. He, for lack of better word, he would --
 18 what did he -- and this is on the Websense side --
 19 he put together deals where we would integrate
 20 Websense onto different platforms.
 21 Q And did he leave the same time as you did?
 22 A I believe he -- I don't recall. I don't
 23 know when he left.
 24 Q Do you remember if it was before or after
 25 you?

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1 A I believe it incorporated an FTP server.
 2 Q And was IP forwarding turned off?
 3 A I don't recall.
 4 Q Okay. Do you recall any other
 5 functionalities that it had?
 6 A I believe it had a DNS server, and I
 7 believe it had an e-mail server. I don't recall
 8 anything else.
 9 Q Now, the version you had up and running,
 10 was it an actual version, or was it a beta version?
 11 A I don't remember.
 12 Q Did you have access to the source code?
 13 A No.
 14 Q And you have no records to show whether it
 15 was or not?
 16 A Whether it was or not what?
 17 Q A beta version?
 18 A I have no records.
 19 Q Do you know if your installation of it was
 20 subject to any confidentiality obligations?
 21 A I don't remember.
 22 Q On Exhibit 138, could you turn to
 23 page 58699, please.
 24 A Uh-huh.
 25 Q On the bottom of the page, it says "The

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1 A I don't recall.
 2 Q Going back to page 58700, it says, you
 3 know, the second paragraph -- well, the first
 4 paragraph of the response which, I guess, is the
 5 first paragraph after all the carats -- it says:
 6 "Although this is true, it's somewhat misleading."
 7 It says that BorderWare, BNTI, BorderWare Network
 8 Technologies, launched JANUS at the U.S. Networld
 9 Interop in September.
 10 That is the conference you were at?
 11 A Uh-huh.
 12 Q Okay. Do you have -- you have no
 13 information that it was launched at any time prior
 14 to that?
 15 A I don't.
 16 Q And then if you scroll -- look down a
 17 little further, that says, "This is not correct."
 18 This says: "Only operational site in U.S. is at a
 19 reseller in California, NetPartners."
 20 That was you?
 21 A Yep.
 22 Q Do you know who -- is it Beame &
 23 Whiteside?
 24 A Yeah. I don't -- I don't believe they
 25 were a customer of ours.

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1 Q Okay. Then it says: "Second U.S.
2 reseller has completed a technical evaluation of the
3 product."
4 Do you know who that is?
5 A No.
6 Q And a little further down the paragraph:
7 "With our launch in Canada," the last line there
8 says, "we have been accumulating experience since
9 February using beta software."
10 Do you know anything about that?
11 A No.
12 Q So you don't know where that was -- that
13 experience was --
14 A No.
15 Q -- gleaned from?
16 You didn't see it or use it or hear
17 anything about it?
18 A No.
19 Q Do you know how much you sold your product
20 for?
21 A No, not offhand.
22 Q Did you ever just sell the software?
23 A It's possible that we did. I don't recall
24 whether we did or did not.
25 Q Border didn't require you to sell it

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1 customers?
2 A Uh-huh. Yes.
3 Q Did you generate revenue from the
4 services --
5 A Yes.
6 Q -- separate from the actual machine?
7 A Yes.
8 Q And would you have got any revenue from
9 the services if you didn't sell them the machine?
10 A I'm sorry. What was the question?
11 Q Would you have been getting the service
12 revenue if you did not also sell them the machine
13 and the JANUS software?
14 A That service revenue was specific to
15 maintenance for the machine and software.
16 Q Okay. So are there -- so when other
17 resellers came on the market, did you generate ever
18 any revenue from just service provider for those
19 systems that were obtained from another reseller?
20 A Yeah. Sometimes we would be asked to fix
21 an installation because it gets into the realm of
22 how you configure the software and what odd or
23 broken things there are on the customer's local area
24 network. So we would often -- we would sometimes go
25 on customer sites and help them, essentially, with

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1 preinstalled; that was your option?
2 A Correct.
3 Q How did you receive the software from
4 Border?
5 A Initially, as I recall, it was on tape.
6 It was -- yeah.
7 Q Did you just use the one tape to install
8 on all the machines?
9 A I believe so. I believe it came on tape,
10 and then they would give us serial numbers, like,
11 serial numbers or activation codes to -- to activate
12 it. Of course, we were getting different versions
13 of it as time progressed.
14 Q So they would send you updated versions,
15 and then that's what you would use in your installs?
16 A Yeah.
17 Q Were there any patches for previous
18 customers?
19 A We would have upgraded the previous
20 customers. I mean, that would have been part of our
21 service.
22 Q And you did the integration at the
23 customer site yourself?
24 A Yes.
25 Q And so you did offer services to your

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1 their network, integration and network.
2 Q But were they your customers?
3 A Sometimes. I mean, it's possible that a
4 firewall was sold by somebody else, and then we
5 would go in there after the fact and help them with
6 it. I mean, you know, we -- we didn't just sell the
7 hardware and software. We also sold networking
8 services as well on a consulting basis, per diem
9 basis.
10 Q Right. But I'm specifically saying
11 services for the JANUS software. Did you provide --
12 was that one of the -- when you did a sale for the
13 JANUS software, did you also negotiate a service
14 package, some kind of --
15 A We would always sell a service agreement
16 yearly, a yearly software -- a yearly service
17 agreement. And that service agreement would be for
18 configuring the software, helping them with their
19 network, getting it to work correctly, that kind of
20 stuff.
21 Q When you say "configure their software,"
22 you're referring to the JANUS software?
23 A Correct.
24 Q But if you didn't happen to sell them that
25 JANUS software, you wouldn't have that service

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1 agreement?

2 A Right. We weren't on the -- I don't know

3 exactly what you are asking. But if you asking

4 whether we would be on the hook for somebody else's

5 purchase of JANUS software --

6 Q No. I'm just saying that by selling

7 the -- being able to sell JANUS software, you were

8 also able to generate revenues providing service for

9 it.

10 A Yes.

11 Q And do you recall whether or not you

12 generated more revenue from the service, or from the

13 product itself?

14 A I would have to look in the P&L.

15 '95 would be a good P&L to look at. But I believe

16 the -- I believe the margins on the software were

17 higher than the service. But, you know, there's a

18 lot of different ways to slice that pie.

19 What are the margins on the service? You

20 know, you'd have to figure out how much money you're

21 making per employee, how much margin you're making

22 on the software. I mean, it's a complicated

23 question, actually.

24 Q And do you think it was reflected in the

25 P&L?

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1 We were still called NetPartners back

2 then, though.

3 So at that point, from that point on, we

4 were kind of two companies, in a way. We were

5 continuing and still ramping up, still growing the

6 Internet firewall reseller part of the business

7 while as well, now we were a product manufacturer

8 and ramping up that side of the business.

9 Q But you don't recall specifically when it

10 fully became Websense and NetPartners --

11 A You would have to look at the historical

12 record to figure that one out. But I believe

13 actually that it wasn't -- didn't actually change

14 names. The company didn't change names until, I

15 want to say, until 2000.

16 Q And do you know after -- when it changed

17 names in 2000, were you still acting as a reseller

18 as well?

19 A I believe we were. A reseller of software

20 in general, we were. Whether we were reseller of

21 BorderWare, I don't recall.

22 Q And it became -- you were still with the

23 company when it became Websense, and you were--

24 A Actually, at that point, I wasn't CEO

25 anymore. At that point, I was -- as far as I

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1 A No. Because you -- as I say, to actually

2 answer that question, you'd have to figure out, you

3 know, wages you're paying for each employee, what

4 your actual cost of goods sold is for the services

5 versus the cost of goods sold for the software.

6 That part is easy to figure out, but cost of goods

7 sold for employees is harder to figure out.

8 Q So you have employees who handle most of

9 the services?

10 A Uh-huh.

11 Q But you also have employees who did the

12 installation and also the deployment?

13 A Correct.

14 Q Do you recall how long you sold the

15 product for?

16 A Not specifically, no.

17 Q Did you sell it -- did you have any sales

18 in 1996?

19 A Yes.

20 Q Do you know if you had any sales in '97?

21 A Don't know.

22 Q What time did -- did you become Websense?

23 A Well, we started selling the Websense

24 product in '96. We started selling it in October of

25 '96, the Websense product.

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1 recall, I was just on the board at that point.

2 Q And did you have any day-to-day

3 responsibilities?

4 A No.

5 Q Do you know why you were no longer CEO?

6 A I was fired. Fired from my own company.

7 That was a fun one. I don't want to bore you with

8 the board-level crap that went on.

9 Q I'm sure it wasn't pleasant for you.

10 A It was a giant learning experience.

11 Q So would you consider the JANUS firewall a

12 successful product?

13 A Sure.

14 Q Do you know how long you operated that,

15 with that as your only product?

16 A I don't specifically know. I'm pretty

17 sure that -- well, I know it was our only product in

18 '95. And I'm pretty sure for most of '96, if not

19 all of '96, it was our only product. But at some

20 point, we brought other firewalls on board.

21 Q And did you itemize-- would you have

22 itemized sales for each of the products that you

23 sold?

24 A I don't know if I have those records

25 anymore, but I don't know.

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1 Q And the new firewall products that you
2 brought on had different functionalities or
3 different features than the JANUS?
4 A Yes.
5 Q Do you recall what the differences were?
6 A Technically, there's a stateful packet
7 inspection was the new technology that I believe the
8 manufacture -- I believe the product was called
9 FireWall-1. And that was the main innovation that
10 FireWall-1 had, and I believe that was the main
11 difference.
12 Q Do you know technically how staple packet
13 inspection differed from the application layer
14 proxy?
15 A I used to, yes. But right now, if I tried
16 to give you an explanation, I would fumble it.
17 Q Do you want to try?
18 A No.
19 Q Could you try?
20 A What's that?
21 Q Could you try?
22 A Oh, gosh. It wouldn't -- I wouldn't be
23 correct. I mean, I -- it's been a long time.
24 Q Have you ever heard of a company called
25 Beavertec?

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1 products now.
2 Q Okay.
3 A I mean, the core product is a Web filter
4 product that allows companies to monitor and control
5 employee access out to the Internet. But they have
6 a bunch of other security-related services,
7 inventory service, asset management, everything
8 else.
9 Q How does the Web-filtering technology
10 work?
11 A Well, the way that works is when people
12 within a company make -- go to a particular Web
13 page, they will type in a Web address. The Websense
14 product intercepts that query and looks up the
15 actual IP address in a large database.
16 Q Is that the DNS database?
17 A In its own database.
18 Q Okay.
19 A So, yeah, I'm trying to remember whether
20 it looks up an IP address or the actual domain name.
21 But either way, it looks up the IP name or both or
22 combination thereof and the URL in its own database,
23 and it finds out the category that that Web page
24 would correspond to.
25 Websense has built through many years a

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1 A Beavertec? I don't think so.
2 Q And SecureIT?
3 A I don't recall.
4 Q When you brought on other firewall
5 products, would you still sell the JANUS product
6 with it?
7 A Beside it, yeah, we sold JANUS alongside
8 FireWall-1 for quite a while.
9 Q Do you remember what the comparison of the
10 sales figures were between the two?
11 A No, I don't.
12 Q Were they at the same price point?
13 A I don't recall.
14 Q And you don't recall the number of units
15 that moved at the time?
16 A I don't recall.
17 Q Go off the record for a moment.
18 (Recess)
19 MR. CHEVALIER: Back on the record.
20 BY MR. CHEVALIER:
21 Q Mr. Trubey, tell me what product Websense
22 sells.
23 A The company right now, Websense?
24 Q Yes.
25 A Well, it sells a whole bunch of different

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1 database, basically, of the entire Web, assigning
2 categories to all the different Web pages out there.
3 And so depending on the -- on the
4 company's policy that they put in place with the
5 Websense software, the Websense gateway will then
6 allow a person to view it or block it or just report
7 upon it or whatever.
8 Q Now, would that be on the local area
9 network? At what point is that integrated?
10 A At the far -- basically, at the same spot
11 a firewall would be. And, in fact, that was one of
12 the main things that we did is that we integrated
13 the Websense -- the Websense initially was just a
14 stand-alone product that would be sitting beside the
15 firewall, if you will.
16 But one of the things that we did fairly
17 soon afterwards is we integrated it in with
18 firewalls so that the FireWall-1, for instance, I
19 think this was our first integration.
20 And then we tried to integrate it with
21 BorderWare as well. Tell you the honest truth, I
22 don't remember whether or not we successfully
23 integrated it with BorderWare or not. But the idea
24 is that -- so now you've got a firewall running
25 Websense.

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1 Q Now, would it still process the packets?

2 I mean, is that how it says request the address, and

3 it kind of filters the addresses? It does it on an

4 application layer?

5 A It would do it at the application level,

6 yeah.

7 Q And does it use proxies as well?

8 A No. It doesn't use proxies.

9 Q So when it's integrated onto, you said, is

10 it FireWall-1?

11 A Uh-huh.

12 Q Is the FireWall-1 application layer of

13 proxy a transparent proxy firewall?

14 A Well, it's a staple packet inspection

15 firewall.

16 Q So you don't really know how that's

17 different?

18 A Right.

19 Q But you don't know if you put it on

20 BorderWare?

21 A I do not recall whether we did that or

22 not. I know I was trying. I tried. I made a

23 couple trips. BorderWare got very squirrely towards

24 the end. I mean, they ended up getting bought by

25 somebody; right? So -- yeah.

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1 MR. CHEVALIER: Go back on the record.

2 BY MR. CHEVALIER:

3 Q Before we went off the record, we were

4 talking about patent applications that might be

5 listed in your name.

6 A Uh-huh.

7 Q There was one that seemed to be filed

8 June 20th, 2002, titled "Contextual Merchandising

9 System for an Electronic Network."

10 Do you recall that?

11 A That was the one that I was wondering

12 whether or not I actually did file it and all that

13 kind of stuff. So, yeah. That was a company -- if

14 I recall, Merchandising Avenue or Cachepile at the

15 time. I'm not sure which.

16 Q And does that company still exist?

17 A No.

18 Q So do you know if there's any product or

19 services that's covered by this patent application

20 that's being marketed --

21 A I do not know.

22 Q And we've talked a lot about your

23 experience as the reseller for NetPartners on behalf

24 of Border.

25 Regarding U.S. sales and the use of the

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1 Q Who developed the Web filtering?

2 A Well, I mean, the specific software

3 engineer I hired.

4 Q You hired?

5 A Yeah.

6 Q And do you have any patents covering that

7 technology?

8 A I did not apply for any patents for it. I

9 don't know if Websense has any.

10 Q And you're aware that there is one patent

11 application that lists you as an inventor on it?

12 A Which one is that?

13 Q I have it written if I can get it here.

14 MR. CHEVALIER: Go off the record.

15 (Discussion held off the record)

16 MR. COOPER: Counsel, I'm now producing

17 two documents: One Bates-stamped Trubey 00001 and

18 Trubey 00002.

19 MR. CHEVALIER: Thank you.

20 Do you have copies for Mr. Trubey?

21 MR. COOPER: Yeah. Are you going to use

22 these as an exhibit?

23 MR. CHEVALIER: Maybe. We can go off the

24 record now.

25 (Recess)

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1 product, you would be the best person who would have

2 knowledge on that?

3 A In -- regarding U.S. sales?

4 Q Well, regarding the first U.S. sale?

5 A Oh, regarding the first U.S. sale?

6 Probably. Yeah. I believe we were the first U.S.

7 reseller, so . . .

8 Q So what about the first U.S. use?

9 A Unless you can find somebody else.

10 Q So it would be you? I'm sorry?

11 A I believe I was the first U.S. reseller,

12 but there might have been -- the first U.S. user,

13 but there might have been someone else. I don't

14 have any knowledge of anybody else.

15 Q But going back to -- if you go back to

16 Exhibit 138?

17 A You mean where Rod actually says I was the

18 first?

19 Q Yes.

20 A So, yes, Rod Adkins seems to say I was the

21 first U.S. user of it.

22 Q So with regard to the first U.S. use, you

23 would be the best person with knowledge on that?

24 A I would guess so.

25 Q Is that a "yes"?

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1 A Yes.

2 Q Thank you.

3 MR. CHEVALIER: I have nothing further.

4 MR. COOPER: Okay. Let's go off the

5 record, please.

6 (Discussion held off the record)

7

8 EXAMINATION

9 BY MR. COOPER:

10 Q Will Cooper, representing defendant

11 Fortinet.

12 If we can turn back to Exhibit 138. And

13 in particular, the page labeled

14 Bates number 4-NPS058692.

15 A Yes.

16 Q We're going to walk through this posting.

17 Let's start at the top.

18 Do you see at the top there's a date

19 listed of --

20 A Sure.

21 Q What date is listed there?

22 A Monday, October 17th, 1994.

23 Q And what time was this?

24 A 8:31.

25 Q And it shows that the e-mail was sent by

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1 through that research that I was on it.

2 Q Was Great Circle open to the public?

3 A Yes, it was.

4 Q Were you aware of any obstacles that

5 anyone might have in trying to send an e-mail to the

6 posting group?

7 A No.

8 Q At the beginning of your posting, I

9 believe you paste in a previous e-mail; is that

10 right?

11 A Yes.

12 Q And who was this e-mail from?

13 A I was replying to somebody else's e-mail.

14 I was replying to Scott Renner for Macro.

15 Q And what is Scott Renner asking, speaking

16 generally? You don't have to reread the e-mail.

17 Just kind of sum it up.

18 A Basically, Scott is asking if anybody has

19 any experience running the JANUS firewall.

20 Q Okay. And you replied, "Well, we are

21 running it at our site"; is that right?

22 A That's correct.

23 Q And then the next sentence, you say: "I

24 can attest that it works as advertised"?

25 A That's correct.

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1 you; is that correct?

2 A That's correct.

3 Q Or the posting?

4 A It was an e-mail. It was an e-mail to an

5 e-mail list.

6 Q Okay. And this e-mail address,

7 phil@netpart.com, was that your e-mail address at

8 that time?

9 A Yes.

10 Q Do you remember writing and sending this

11 e-mail?

12 A I remember I sent an e-mail to the

13 Great Circle list talking about the firewall as kind

14 of a soft marketing attempt to get people -- get

15 people to know that I was selling the JANUS firewall

16 at the time.

17 Q Does this look like an accurate copy of

18 the e-mail you sent?

19 A Yes, it does.

20 Q Regarding your access to Great Circle, how

21 did you learn about Great Circle?

22 A Oh, just through research. Um, you know,

23 I was attempting to build my own product, so I had

24 to be on many technical mailing lists and many -- I

25 had to research many technical things. So it was

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1 Q When you say "as advertised," what were

2 you referring to?

3 A Well, at that time, Border had a Web site,

4 and they had a description of the firewall. So

5 whatever -- whatever description they had of the

6 firewall was presumably what I meant by "as

7 advertised."

8 Q This was a different era in the Internet,

9 so this question sounds silly today. But at the

10 time, was Border's Web site easily accessible to the

11 public?

12 A No.

13 Q Can you explain how one would access it?

14 A To tell you the truth, I would imagine

15 that most people would get information through

16 printed material. I mean, this is the era where you

17 had brochures and salespeople.

18 I mean, there -- there was a Web site, and

19 people in the university environments would have

20 access to the Web site, but not many corporate -- it

21 was just really target audiences of the product.

22 Not many corporate people would have access.

23 But certainly the real target audience

24 would have been people who weren't connected to the

25 Internet, from their -- from their companies.

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1 Q But people in the university environment
2 and potentially other environments in the U.S. and
3 in Canada could access the Border Web site and see
4 materials about the JANUS product?

5 A Sure. Sure. And if you had -- I mean,
6 again, technical people back then, if their
7 companies weren't connected, then they might have a
8 dial-up connection to the Internet. So technical
9 people, certainly technical network space, you know,
10 would find ways of getting access to the Internet
11 back then.

12 Q You mentioned that the main way
13 information was disseminated at the time was
14 brochures and printed materials.

15 Can you describe what brochures and
16 printed materials were circulating at that time that
17 you were aware of?

18 A I recall that Border had a brochure, but
19 that's about all I can recall.

20 Q So the main way that Border would
21 distribute those, from what you saw directly, would
22 have been trade shows?

23 A Sure.

24 Q Were you aware of any other avenues for
25 disseminating those materials; any other avenues

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1 Q Turning down the page a few paragraphs,
2 second paragraph from the bottom, the last sentence
3 reads: "Personally, I think this is a good design
4 decision from both a security viewpoint and
5 certainly from an ease of use viewpoint."

6 Taking the two viewpoints in turn, do you
7 remember what you meant by "from a security
8 viewpoint"?

9 A From a security viewpoint, I meant that
10 intruders from the outside would not have been able
11 to penetrate the firewall to get access to internal
12 computers.

13 Q And from an ease of use viewpoint, what
14 did you mean?

15 A I meant that users from the inside were
16 able to use Internet services without having to do
17 any changes or configurations on their client
18 computers, on the inside computers.

19 Q Now, in the last paragraph, you list the
20 Web site "Netpart.com/JANUS."

21 At what point did that Web site become
22 operational?

23 A Oh, I think I set up the Netpart.Com --
24 well, the actual domain was operational early '94.
25 But the JANUS portion, I'm not sure, but it would

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1 through which Border disseminated those materials?

2 A No.

3 Q The next sentence, you state: "We've
4 certainly put it through some comprehensive tests
5 ourselves." You described at least one test earlier
6 as setting up two separate computers in your office
7 and having them communicate with each other through
8 the firewall; is that right?

9 A Correct.

10 Q Before -- before you were comfortable that
11 you had a full grasp of the technology, how much
12 testing of that sort did you run the product
13 through?

14 A I tested each -- I tested each application
15 gateway intern [sic] to make sure that it would
16 do -- it would work the way it was supposed to work.
17 Now, I wasn't a QA tester. I didn't test it to the
18 nth degree, and I didn't test all the Border cases,
19 but I -- all that kind of stuff -- but I did check
20 to see whether it would work in normal usage.

21 Q And it worked well; is that right?

22 A Yes.

23 Q What time period, what month in 1994 did
24 you run those tests?

25 A Either September or October.

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1 have been after the trade show, presumably.

2 Q What trade show are you referring to?

3 A Talking about the September Interop trade
4 show in Atlanta which is the place -- took place on
5 September 10th through the 14th.

6 Q Of 1994?

7 A 1994.

8 Q And at the time you wrote this e-mail,
9 people could access this Web site and see material
10 specifying the technical aspects of the JANUS
11 technology?

12 A Yes.

13 Q Were there any barriers to somebody
14 accessing that particular Web site to see the JANUS
15 technical materials?

16 A No.

17 Q Did you track how many people accessed
18 that Web site?

19 A No.

20 Q Based on information you had, do you have
21 any estimation of how many people accessed that
22 Web site?

23 A No.

24 Q Were there people who told you that they
25 accessed that Web site and looked at the materials

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1 on there?

2 A I don't recall.

3 Q At the time you wrote this posting, was

4 the JANUS product capable of passing the packet to

5 an application level proxy?

6 A At the time that I wrote this, the JANUS

7 product was an application level firewall.

8 Q Okay. And somebody who installed JANUS

9 and used it -- strike that.

10 At the time of the posting, was one of the

11 core functionalities of JANUS passing the packet to

12 an application level proxy?

13 A Now we're getting to technical ways that

14 it worked. I believe the way JANUS worked was by

15 intercepting the packets and dealing with them on

16 the firewall and recreating a new packet out the

17 other side.

18 Q And JANUS was capable of applying rules at

19 that time?

20 A Sure.

21 Q And JANUS was capable of opening another

22 connection to the destination at that time?

23 A Yes.

24 Q At the Interop trade show in Atlanta in

25 1994, how many people, roughly, 20 years ago, were

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1 Q And did those brochures detail the JANUS

2 technology?

3 A Yes.

4 Q You mentioned earlier that at the trade

5 show, Border had computer screens showing the user

6 interface.

7 Could you describe in a little more detail

8 what was on the computer screen that they were

9 showing to people?

10 A It was the administrative interface on how

11 to configure the firewall. So they would have an

12 interface, for instance, for the DNS servers -- they

13 had two DNS servers on it -- so you could add

14 machines, delete machines, whatever you wanted to do

15 on the DNS.

16 And they had commensurate interfaces for

17 the other application level firewall things that

18 they had on them.

19 Q And other than handing out printed

20 materials and showing the user interface, was there

21 any other ways that the Border folks communicated

22 how the product worked?

23 A I don't recall.

24 Q Just to clarify my inartfully asked

25 question: They were also describing it verbally to

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1 at that trade show? Was it 50,000 or 500? Any

2 estimation based on memory?

3 A It was a reasonable size. It wasn't -- it

4 was much bigger than 500 people. It was definitely

5 in the tens of thousands of people. Might even have

6 been 100,000 people that attended that thing. It

7 was a pretty big trade show.

8 Q And Border had a booth there?

9 A Yes.

10 Q How many people were at the booth

11 representing Border?

12 A At least two.

13 Q Do you remember those two?

14 A Steve Lam was there, and I believe the

15 other person was Glenn Mackintosh, but I don't

16 specifically recall.

17 Q Sure. Could anyone at the trade show walk

18 up and talk to the BorderWare folks that were there?

19 A Sure.

20 Q And were they displaying the technology to

21 anybody who wanted to see it, as far as you were

22 aware?

23 A Yes.

24 Q Were they handing out brochures?

25 A Yes.

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1 people; is that correct?

2 A Correct.

3 Q To the best of your memory, by what time

4 was the JANUS technology fully operational and

5 running at your office in California?

6 A Mid-October '94.

7 MR. COOPER: That's it for me.

8 MR. CHEVALIER: You want to take a break?

9 THE WITNESS: Just go straight into it.

10 MR. CHEVALIER: Power through.

11

12 FURTHER EXAMINATION

13 BY MR. CHEVALIER:

14 Q I just have a couple of follow-up

15 questions.

16 Looking back at the Great Circle e-mail

17 threads, 58693, Mr. Cooper asked you about the Web

18 page that you had for your company at NetPartners.

19 A Uh-huh.

20 Q And you said that the Web -- at least the

21 link to the JANUS aspect of it, you said the Web was

22 up after the trade show.

23 Do you have any evidence showing exactly

24 when it was available?

25 A Well, I -- I wouldn't have written that

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1 e-mail if it hadn't been up and running by then
 2 because that would have been silly to write an
 3 e-mail that people couldn't get access to. So the
 4 earliest I would know that it would be up for would
 5 have been October 17th.
 6 Q But you have no evidence showing it was up
 7 available any earlier than that?
 8 A I don't have any evidence of that, no.
 9 Q And it said you would be able -- you
 10 testified that you would be able to see the
 11 technical material for JANUS.
 12 Do you know what material you had linked
 13 to that Web site?
 14 A I do not know specifically what material I
 15 had there. It would have been material to explain
 16 the JANUS firewall and an attempt to sell it.
 17 Q But you don't know exactly what the
 18 material was?
 19 A I do not know.
 20 Q And you don't have any evidence that would
 21 show what that material was?
 22 A No.
 23 Q Turning one page back to 692, there you
 24 state that you attest that it works "as advertised"?
 25 A Uh-huh.

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1 that it would work the way it was supposed to.
 2 BY MR. CHEVALIER:
 3 Q And the way you tested it was you said two
 4 machines with the firewall product between it, and
 5 that was basically a separate computer?
 6 A Correct.
 7 Q And how did you determine whether or not
 8 it was functioning properly?
 9 A Basically, from the external machine, I
 10 tried to get access to the internal machine, and I
 11 could not.
 12 From the internal machine, I tried to get
 13 access to the outside machine, and I found that I
 14 could do what I was supposed to through the
 15 firewall. I was able to get through the firewall in
 16 the appropriate way.
 17 Q And besides that, did you test any of the
 18 other functionalities? Did you test the mail or the
 19 FTP?
 20 A Yes. I tested the mail, and I tested the
 21 FTP. I would have tested the name server; make sure
 22 the name server was running. Beyond that, I don't
 23 recall.
 24 Q But you never tested it live to the actual
 25 Internet?

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1 Q Do you know exactly what, quote/unquote,
 2 advertised material you were referring to there?
 3 A I don't recall right now what the
 4 advertised material was back then, if that's what
 5 you are asking.
 6 Q That's what I'm asking.
 7 Regarding the tests that you performed, I
 8 think you testified you were testing an application
 9 gateway intern.
 10 Do you recall that?
 11 A What's the question?
 12 Q You testified that you were testing the
 13 application gateway intern?
 14 A I didn't mean to say that.
 15 Q Do you know what you meant to say?
 16 A At what point did I say that?
 17 Q During Mr. Cooper's questioning.
 18 A I'd have to go back to the transcript
 19 and --
 20 THE REPORTER: Would you like me to find
 21 it and read that portion back?
 22 MR. CHEVALIER: Yes please.
 23 (The record was read.)
 24 THE WITNESS: So I meant I tested each
 25 application functionality one by one to make sure

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1 A I used it as my Internet gateway, but I
 2 don't recall at this point when I attached it to the
 3 Internet.
 4 Q You also testified and said it was capable
 5 of applying rules at that time?
 6 A Yes.
 7 Q Do you have any evidence of that?
 8 A I don't have any evidence right now of
 9 that, no.
 10 Q When you say "right now," do you have any
 11 evidence at all?
 12 A No, I don't.
 13 Q You also said it had the capability of
 14 opening a connection to the destination.
 15 A Yes.
 16 Q Do you have any evidence of that?
 17 A No.
 18 Q And then you also testified regarding the
 19 size of the trade show.
 20 A Uh-huh.
 21 Q Do you have any evidence to support that?
 22 A No. Just my recollection.
 23 Q And then you said there were two
 24 individuals who were at the Border booth.
 25 A Yes.

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1 Q You said it was Mr. Lam and Mr. Macintosh?

2 A It was mr. Lam. I don't recall who the

3 other person was.

4 Q Okay. But you testified that it was

5 Mr. Macintosh.

6 A It could have been Mr. Macintosh.

7 Q But you don't know if it was

8 Mr. Macintosh?

9 A I don't know.

10 Q And you said they were handing out

11 brochures?

12 A Yes.

13 Q Do you have any of those brochures?

14 A No.

15 Q Do you know what the brochures contained?

16 A No.

17 Q You also said they were describing the

18 product verbally?

19 A Yes.

20 Q Do you remember what they were saying?

21 A They were describing how it worked.

22 Q But do you know specifically?

23 A No.

24 Q And then you said you had the system up --

25 up and running on your office in California in

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1

2 FURTHER EXAMINATION

3 BY MR. CHEVALIER:

4 Q You just testified in response that they

5 would have described the functionality; how it

6 worked.

7 Do you have any recollection of actually

8 what they contained?

9 A No.

10 MR. COOPER: Thank you.

11 MR. CHEVALIER: Thank you.

12 MR. COOPER: I'm all set.

13 (Deposition concluded at 12:12 p.m.)

14

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1 mid-October 1994?

2 A Uh-huh.

3 Q Are you aware of any other use of that

4 prior to that in the United States?

5 A I'm not aware of any other use of it, no.

6 Q So regarding use, then, you would be the

7 person with the most knowledge regarding the use of

8 the first use of it in the United States?

9 A As far as I know, yes.

10 Q That's all I have.

11 MR. COOPER: I have very brief follow-ups.

12

13 FURTHER EXAMINATION

14 BY MR. COOPER:

15 Q You just mentioned that you didn't recall

16 specifically what was in the brochures that were

17 being handed out at the trade show in Atlanta.

18 A Correct.

19 Q But you do remember that those brochures

20 contained explanations and illustrations of how the

21 product worked; is that correct?

22 A They would have described what the product

23 did and what its functionality was.

24 MR. COOPER: Thank you.

25 MR. CHEVALIER: One follow-up question.

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1

2 DECLARATION UNDER PENALTY OF PERJURY

3

4 I, Phil Trubey, do hereby certify under penalty

5 of perjury that I have read the foregoing transcript

6 of my deposition, taken on June 13, 2013; that I

7 have made such corrections as appear noted herein in

8 ink, initialed by me; that my testimony as contained

9 herein, as corrected, is true and correct.

10

11 DATED this ____ day of _____, 2013, at

12 _____, California.

13

14

15

16

17

18 _____

19 Phil Trubey

20

21

22

23

24

25

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REPORTER'S CERTIFICATION

I, Audrey L. Ricks, Certified Shorthand
Reporter, in and for the state of California, do
hereby certify:

That the foregoing witness was by me duly
sworn; that the deposition was then taken before me
at the time and place herein set forth; that the
testimony and proceedings were reported
stenographically by me and later transcribed into
typewriting under my direction; that the foregoing
is a true record of the testimony and proceedings
taken at that time.

IN WITNESS WHEREOF, I have subscribed my name
on this 18th day of June, 2013.

Audrey L. Ricks, CSR 12098

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